

Departmental Disclosure Statement

Incorporated Societies Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

11 February 2021

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Part One: General Policy Statement

Introduction

Incorporated societies make a major contribution to civil society in areas such as culture, sport, recreation, education, health, social services, philanthropy, emergency relief, environmental protection, animal protection, and religion. Rūnanga and taura here also operate as incorporated societies, along with civic and advocacy organisations such as trade unions, business and professional associations, political parties, and local interest groups.

There are over 23,000 such entities currently on the Incorporated Societies Register. Together, they make a significant contribution to New Zealanders' well-being.

It is important that the laws governing these entities are complete, accessible, and consistent with the principles of good governance.

Incorporated Societies Act 1908

For over 100 years the Incorporated Societies Act 1908 (the **1908 Act**) has enabled community-related organisations to become incorporated for a wide variety of purposes. However, this Act is now out of date and deficient in some respects.

The issues with the 1908 Act, which this Bill seeks to address, were first identified in a report released by the Law Commission titled "A New Act for Incorporated Societies", published on 21 August 2013. The Commission identified a number of problems with the 1908 Act, which can be broadly categorised as follows:

- the law is incomplete, inaccessible, and unclear:
- the law is inconsistent with incorporated society and governance principles:
- the law is difficult to enforce:
- there are issues with other statutes under which societies operate.

The main problems identified by the Commission are as follows:

- committee members and others taking on responsibilities in incorporated societies have duties that are akin to directors' duties under the Companies Act 1993. These duties are in case law, not in the 1908 Act. As a result, many people who are elected into governance roles do not have a clear understanding of what they have to do to comply with the law:
- the 1908 Act is silent on a number of important governance issues such as dealing with conflicts of interest, personal liability, and the consequences for third parties who deal in good faith with societies that act outside their rules:
- the restructuring options are limited. Unlike the Companies Act 1993, the 1908 Act makes no provision for amalgamations.

Policy to be given effect by Bill

The purpose of this Bill is to put in place a modern framework of basic legal, governance, and accountability obligations for incorporated societies and those who run them.

The regime to be put in place by the Bill is guided by the following broad policy objectives:

- members of a society have the primary responsibility for holding the society to account; and
- a society should promote the trust and confidence of its members; and
- a society should be self-governing; and
- a society should not distribute profits to its members.

While the Bill is a new, stand-alone, statute it does not depart from the underlying principles of the current law on incorporated societies. However, some of this law was not previously contained in the 1908 Act, but has instead built up in case law over time. As a result of this,

when the Bill and the 1908 Act are directly compared it can appear that new onerous obligations are being imposed on societies when this is not the case.

In particular, the Bill puts in place 6 broadly expressed duties on the officers of a society (modelled on directors' duties in the Companies Act 1993) as follows:

- officers should act in good faith and in best interests of the relevant society:
- officers must exercise their powers for a proper purpose:
- officers must not act, or agree to the society acting, in a manner that contravenes the Bill or the constitution of the society:
- officers must show the care and diligence that a reasonable person with the same responsibilities would exercise in the same circumstances:
- officers must not let the activities of the society be carried on in a way likely to create a substantial risk of serious loss to the society's creditors:
- officers should not agree to a society incurring an obligation unless they believe that the society will be able to perform the obligation when it is required to do so

While there are no such duties in the 1908 Act, the inclusion of these duties in the Bill codifies existing case law that officers have fiduciary duties to their societies. This will make it clearer to the officers of a society what their duties are.

The Bill also closes certain gaps in the 1908 Act by—

- providing an express mechanism for societies to amalgamate with each other (based on a simplified version of what is included in the Companies Act); and
- including civil law enforcement provisions that clearly state who may apply to a court for orders in respect of a society and the type of orders that the court can make.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The Minister of Justice made a referral on 1 July 2010 asking the Law Commission to review incorporated societies law. The Commission's report, A New Act for Incorporated Societies, was published on 21 August 2013 and is available on the Commissions website here: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R129.pdf. This report recommended that the Incorporated Societies Act 1908 (1908 Act) should be repealed and replaced by a more modern statute.</p> <p>In February 2014, the Government responded to the Law Commission report, agreeing to 101 of the Law Commission's 102 recommendations in full or in principle. This Bill gives effect to those recommendations.</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	N/A
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>A regulatory impact statement (RIS) accompanied the Cabinet paper considered by Cabinet in February 2014. That paper contained the substantive policy decisions reflected in the Bill. A copy of the RIS can be found here: https://www.mbie.govt.nz/assets/81cd4bdd55/ris-new-act-for-incorporated-societies.pdf. This RIS resulted in the preparation of a Draft Bill for public consultation.</p> <p>A supplementary regulatory impact analysis (RIA) was prepared in May 2019 to support a number of further policy decisions. It concerned:</p> <ul style="list-style-type: none">• for incorporated societies not registered as charities that fall below certain thresholds, the creation of an exemption from the obligation to use XRB accounting standards; and• for incorporated societies that are registered under the 1908 Act at the time the new Act comes into force, a change to the manner and timeframe in which they would transition to the new regime. <p>A copy of that RIA can be found here: https://www.mbie.govt.nz/assets/1e3473d167/reform-of-the-incorporated-societies-act-1908-annex-2-impact-assessment.pdf.</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>It was in fact the General Manager of Strategic Policy at MBIE, and the MBIE Impact Analysis Review Panel, that reviewed the regulatory impact statement accompanying the February 2014 Cabinet paper. They concluded that “the information and analysis summarised in the RIS meets the criteria necessary for ministers to fairly compare the available policy options and take informed decisions on the proposals in the paper”.</p> <p>It was then MBIE’s Regulatory Impact Analysis Review Panel that reviewed the regulatory impact assessment accompanying the May 2019 Cabinet paper. The Panel considered that the information and analysis summarised in the regulatory impact assessment could be more concise but met the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.</p> <p>Other policy proposals received an exemption from the Regulatory Impact Requirements. The Regulatory Quality Team at the Treasury agreed that no formal Regulatory Impact Statement was necessary in support of those proposals, whose impact (over and above the reforms agreed separately) was expected only to be minor.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The RIS from 2014 considered the costs and benefits of the various reforms to the law relating to incorporated societies recommended by the Law Commission. It noted that:</p> <p>“The nature and rigor of the analysis is limited by the need to rely on subjective judgment about the size of the potential impacts. That reliance arises because of the difficulties in reliably quantifying how changes either individually or as a whole translate into improved sector efficiency and effectiveness. Attempting to quantify many of the benefits in dollar terms could amount to little more than guesswork that could overstate the amount by hundreds of percent or understate it by amounts considerably in excess of 50 percent.”</p> <p>That RIS can be found here: https://www.mbie.govt.nz/assets/81cd4bdd55/ris-new-act-for-incorporated-societies.pdf.</p> <p>The RIA from 2019 considered the costs and benefits of proposed changes to the financial reporting requirements for incorporated societies and the transitional arrangements for incorporated societies. A copy of the RIA can be found here https://www.mbie.govt.nz/assets/1e3473d167/reform-of-the-incorporated-societies-act-1908-annex-2-impact-assessment.pdf.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The compliance costs for existing incorporated societies transitioning to the new incorporated societies regime will, in part, depend on their existing rules and processes for making changes to those rules (for example, in order to introduce new rules on dispute resolution procedures).</p> <p>If those rules do not comply with the new content requirements to be brought into effect by the Bill then they will need to be amended to do so.</p> <p>The compliance costs associated with societies having to replace or add provisions to their rules is discussed at paragraphs 98 to 107 of the RIS from 2014. That document can be found here: https://www.mbie.govt.nz/assets/81cd4bdd55/ris-new-act-for-incorporated-societies.pdf.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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Officials considered whether there were any relevant international obligations in the course of developing the Bill.
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Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Officials have been conscious during the development of the Bill that Māori make considerable use of incorporated societies as a vehicle for community endeavours and have undertaken targeted consultation with Māori about the Bill.
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However, no formal process was undertaken to determine whether the policy to be given effect by the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	NO
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No concerns have been raised by the Ministry of Justice in relation to provisions in the Bill limiting any of the rights and freedoms affirmed in the New Zealand Bill or Rights Act 1990.
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>Offences and penalties</p> <p>The Bill has a hierarchy of offences. Less serious, infringement type, offences attract an infringement fee of an amount to be prescribed by regulation (this fee may not exceed \$1,000); or a fine imposed by a court not exceeding \$3,000. The most serious types of offending under the Bill can attract penalties of imprisonment for up to 5 years and a fine of up to \$200,000.</p> <p>A full list of the infringement offences in the Bill is set out in response to question 4.4 below. The other offences contained in the Bill are set out in Annex One below.</p> <p>Jurisdiction of a court</p> <p>Where a society is alleged to have committed an infringement offence:</p> <ul style="list-style-type: none"> proceedings can be taken against them under section 14 of the Criminal Procedure Act 2011; or they can be issued with an infringement notice (clause 153 of the Bill) <p>Clause 154(2) of the Bill provides that where proceedings are taken under section 14 of the Criminal Procedure Act leave of a District Court Judge or Registrar under section 21(1)(a) of the Summary Proceedings Act 1957 is not required. Officials consider that this is justified in this case because the relevant offences are administrative in nature.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice has been consulted in relation to the provisions listed above.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
Clauses 222-227 provide for the establishment and operation of a register of incorporated societies. This register will also include the names of the officers of the society and of all persons who have been officers of the society since the society was first registered.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
Officials consulted with the Office of the Privacy Commissioner. They provided comment on the rights of members to access information held by incorporated societies, and on information about society officers that will appear on the register of incorporated societies.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>An exposure draft of the Bill was released for public comment in 2015. A number of changes have been made to the Bill as a result of submissions received.</p> <p>Officials have also consulted with the Ministry of Justice, the Ministry for Primary Industries, the Inland Revenue Department and the Department of Internal Affairs at various stages during the development of the Bill.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>Officials consulted the Legislation Design and Advisory Committee (LDAC) on the design of the Bill. LDAC's comments focused on the transition regime for existing societies to move from registration under the 1908 Act to registration under the Bill, once enacted.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	YES
<p>Clauses 153-160 of the Bill provide that failure by a society to comply with any of the provisions listed below is an infringement offence and that that society is liable to pay:</p> <ul style="list-style-type: none">an infringement fee of an amount to be prescribed by regulation (this fee may not exceed \$1,000); ora fine imposed by a court not exceeding \$3,000 <p>The relevant provisions are:</p> <ul style="list-style-type: none">clause 33 (duty to notify the Registrar of amendments to the constitution):clause 47 (duty to notify Registrar of appointments and other changes relating to officers):clause 73 (duty to maintain a register of members):clause 78(1) (duty to call annual general meeting):clause 78(3) (duty to hold, and keep minutes of, annual general meetings):clause 86 (duty to send copy of passed resolution in lieu of meeting to certain members):clause 95(3) (duty to register financial statements):clause 102(1) (duty to register an annual return):clause 103 (duty to have registered office):clause 109 (duty to give Registrar notice of change of contact person).	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Clause 247 of the Bill provides that the Governor-General may, by Order in Council, make regulations providing:</p> <ul style="list-style-type: none">• for transitional arrangements which apply in addition to, or in substitution for, the transitional provisions in Schedule 1 of the Bill• that specified provisions of the Bill (including definitions and any transitional provisions in Schedule 1), or provisions of other enactments amended, revoked, or repealed by the Bill, do not apply, or continue to apply or apply with modifications or additions, or both, during the transition between the 1908 Act and the new Act. <p>The Minister must not recommend the making of regulations under this clause unless they are satisfied that the regulations are:</p> <ul style="list-style-type: none">• necessary or desirable for the orderly implementation of the Bill; and• consistent with the purposes of the Bill. <p>Any regulations made under this clause will be drafted by the Parliamentary Counsel Office, subject to Cabinet scrutiny, and will not come into force until at least 28 days after they are made. In addition, any regulations made will be subject to disallowance under the Legislation Act 2012 and to review by the Regulations Review Committee under Standing Order 319.</p> <p>Officials currently expect that transition from the 1908 Act to the new Incorporated Societies Act will be completed four years after the Bill receives Royal Assent. Clause 247 will accordingly self-repeal 5 years after the date on which it comes into force.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 245 of the Bill provides that the Governor-General may, by Order in Council, make wide ranging regulations for the purposes of the Bill including:</p> <ul style="list-style-type: none"> • prescribing information that must be included or provided for the purposes of the Bill • prescribing procedures, requirements, and other matters, for the register of incorporated societies • declaring any class or classes of persons to be, or not to be, officers for the purposes of the Bill • setting the infringement fee for each infringement offence, which must not exceed \$1,000 • prescribing requirements for the financial statements of small societies • prescribing, for the purposes of any provision of this Act that requires a thing to be done in a manner prescribed by the regulations, the manner in which the thing must be done • prescribing the manner for serving documents on a society and when the documents are treated as received • prescribing how information may or must be given to, provided to, or served on any person under the Bill and other matters relating to that procedure 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>The Bill includes provisions enabling entities incorporated under their own statutes to convert into societies incorporated under the new Incorporated Societies Act. However it also includes provisions enabling the repeal of those statutes by Order in Council, once the relevant entity has exercised its right to convert. Officials do not consider that a mechanism enabling legislation which has become redundant to be easily repealed rises to the level of creating a constitutional concern, in terms of Chapter 15 of the LDAC Guidelines on the Process and Content of Legislation. In the absence of such a mechanism, each of the statutes in question would need to be specifically amended to allow the relevant entities to be able to convert into an incorporated society, and a second Act would then be required to repeal the primary Act. This would require considerable House time.</p>	

Appendix One: Further Information Relating to Part Three

Fine not exceeding \$5,000:

- Clause 114 (Use of society name)
- Clause 189 (Officers must sign certificate)

Fine not exceeding \$10,000”

- Clause 151 (Improper use of “Incorporated”, “Inc”, or “Manatōpū”)
- Clause 236 (What powers may be exercised)
- Clause 237 (Offence to obstruct or hinder)
- Clause 238 (Disclosure of information and reports)

Imprisonment for a term not exceeding 1 year, a fine not exceeding \$50,000, or both”

- Clause 147 (False statements)
- Clause 152 (Banning order contravention)

Imprisonment for a term not exceeding 5 years, a fine not exceeding \$200,000, or both”

- Clause 146 (Dishonest use of position)
- Clause 148 (Fraudulent use or destruction of property)
- Clause 149 (Falsification of register, records, or documents)
- Clause 150 (Operating fraudulently or dishonestly incurring debt)